

DA 18-0238

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 4N

KS VENTURES, LLC an Arizona
Limited Liability Company,

Plaintiff and Appellee,

v.

WILLIAM M. RUSSELL; K.E. SMITH
REVOCABLE TRUST; MYERS
REVOCABLE TRUST; KIM RUSSELL;
SHARON HUFF; BEN WEIDLING;
THE LAMAR COMPANIES; U.S. TREASURY
by and through the INTERNAL REVENUE SERVICE;
MONTANA SWEETGRASS RANCH
HOMEOWNERS' ASSOCIATION, INC.;
DOE DEFENDANTS I THROUGH X, inclusive,

Defendants,

WILLIAM M. RUSSELL,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-16-389B
Honorable Robert B Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

William M. Russell, Self-Represented, Columbia Falls, Montana

For Appellee:

Martin S. King, Worden Thane P.C., Missoula, Montana

A

Submitted on Briefs: November 28, 2018

Decided: January 8, 2019

Filed:

/S/ BOWEN GREENWOOD
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 William M. Russell appeals from an Eleventh Judicial District order granting summary judgment to KS Ventures, LLC, an Arizona limited liability company (KS Ventures). We affirm.

¶3 The material facts are not in dispute. Karen Smith, a principal in KS Ventures, and Russell were married in 2013. Russell owned several encumbered properties in Montana (the Flathead County properties) and in Arizona, which were then in default. Smith had significant cash resources. The day before the parties were married, Smith and Russell executed a written prenuptial agreement, which included:

(5) From time to time, the parties may agree to enter into a joint business venture. Such venture shall be codified by a written agreement which shall outline the respective profits, equity increases, or value each party owns.

¶4 On April 25, 2013, Smith and Russell executed and signed an agreement (Loan Agreement) whereby Smith agreed to loan Russell a revolving line of credit up to \$5,000,000. The Loan Agreement stated that failure to pay real property taxes and failure to keep other loans on the Flathead County properties current were events triggering default. Russell additionally signed a deed of trust in favor of Smith securing payment

and performance of the Loan Agreement and listing the Flathead County properties. The deed of trust was recorded. The Loan Agreement contained an acceleration clause, whereby the debt secured by the deed of trust would become immediately due in the case of default. Smith assigned the Loan Agreement to KS Ventures.

¶5 Between 2013 and 2016, KS Ventures loaned Russell over \$1,921,008 to pay creditors for claims arising prior to the marriage and to protect his collateral.

¶6 Smith filed to annul her marriage to Russell in October 2015. Subsequently, Russell defaulted on the Loan Agreement by ceasing to make payments on the loan advances and failing to pay the prior mortgage and real property taxes on the Flathead County properties. On August 17, 2016, the Superior Court of Arizona, Maricopa County, issued a Decree of Annulment, which: (1) annulled the marriage of Smith and Russell, and (2) found the prenuptial agreement valid and enforceable.

¶7 In May 2016, KS Ventures filed a judicial collection and foreclosure action against Russell seeking repayment of the loan advances under the Loan Agreement and foreclosure on the deed of trust securing repayment.

¶8 On July 21, 2017, KS Ventures filed a motion for summary judgment, which Russell opposed. Russell requested oral argument on KS Ventures' motion, which the District Court granted. Russell failed to appear on the date set for oral argument. Russell then requested the District Court reschedule oral argument, which the District Court denied. On March 5, 2018, the District Court granted KS Ventures' motion for summary judgment, and later, ordered the Flathead County properties foreclosed and awarded KS

Ventures attorney fees and costs. Russell appealed. On June 1, 2018, the Flathead County properties were sold.

¶9 On appeal, Russell argues pro se that the District Court improperly denied his request to reschedule the oral argument on KS Ventures' motion for summary judgment after he failed to appear. Russell further argues that the District Court improperly granted summary judgment to KS Ventures because issues of material fact existed. Specifically, Russell argues that the Loan Agreement did not obligate him to repay the \$1,921,008 because the Loan Agreement established a joint venture; Smith and Russell were partners, not lender and borrower, respectively.

¶10 This Court reviews a district court's decision to deny oral argument on a summary judgment motion for an abuse of discretion. *Virginia City v. Olsen*, 2002 MT 176, ¶ 13, 310 Mont. 527, 52 P.3d 383. Any motion for a continuance is within the sound discretion of the district court. This Court will not overrule a district court's decision to deny a request for a continuance, unless there is an affirmative showing of prejudice. *Fair Play Missoula, Inc. v. City of Missoula*, 2002 MT 179, ¶ 34, 311 Mont. 22, 52 P.3d 926.

¶11 Here, there is no such showing of prejudice. On February 16, 2018, the District Court mailed its order granting Russell's request for oral argument to the address Russell filed with the court. Oral argument was set for March 2, 2018, at 11:00 a.m. Russell failed to appear. For Russell to claim that the District Court denied him due process when he had notice and failed to appear at the scheduled time is "an abuse of the appellate process." See *Fair Play Missoula*, ¶ 39. The District Court did not abuse its discretion by denying Russell's request to re-schedule oral argument.

¶12 This Court reviews a district court's grant or denial of summary judgment de novo using the same M. R. Civ. P. 56(c) criteria applied by the district court. *Lone Moose Meadows, LLC v. Boyne USA, Inc.*, 2017 MT 142, ¶ 7, 387 Mont. 507, 396 P.3d 128. This Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *Lone Moose Meadows, LLC*, ¶ 7. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c).

¶13 In collection and foreclosure actions, the prima facie elements are: (1) debt of the defendant; (2) non-payment of the debt; and (3) present ownership of the debt by the complaining party. *First Nat'l Bank v. Quinta Land & Cattle Co.*, 238 Mont. 335, 339, 779 P.2d 48, 50 (1989).

¶14 The District Court properly concluded that this proceeding has no genuine issues of material fact. Russell signed the Loan Agreement, which unconditionally obligated him to re-pay the loan advances.¹ Smith assigned the Loan Agreement to KS Ventures. Russell borrowed \$1,921,008. Russell defaulted on the Loan Agreement by ceasing to make payments on the loan advances, failing to pay real property taxes on the Flathead County properties, and failing to keep the loans on the Flathead County properties current. KS Ventures filed a collection and foreclosure action against Russell. This Court agrees with the District Court.

¹ While Russell argues on appeal that his signature on the Loan Agreement was a stamp, KS Ventures presented evidence that Russell admitted he signed the Loan Agreement in a previous action.

¶15 This Court is similarly unpersuaded by Russell’s argument that the Loan Agreement created a joint venture, such that KS Ventures and Russell agreed to equally share in both profits and losses. In Montana, a joint venture is an “association of two or more persons to carry on a single business enterprise for profit.” *Brookins v. Mote*, 2012 MT 283, ¶ 43, 367 Mont. 193, 292 P.3d 347. “The relationship of joint adventurers is a matter of intent, and arises only where they intend to associate themselves as such.” *Rae v. Cameron*, 112 Mont. 159, 168, 114 P.2d 1060, 1064 (1941). Establishment of a joint venture requires: “(1) an express or implied agreement or contract creating a joint venture; (2) a common purpose; (3) community of interest; and (4) an equal right to control the venture.” *Pearson v. McPhillips*, 2016 MT 257, ¶ 8, 385 Mont. 171, 381 P.3d 579.

¶16 There is no evidence that either party intended the Loan Agreement to create a joint venture. While the basis for Russell’s argument is the sentence in the prenuptial agreement stating, “from time to time, the parties may agree to enter into a joint business venture,” the prenuptial agreement further states, “such venture shall be codified by a written agreement which shall outline the respective profits, equity increases, or value each party owns.” The Loan Agreement nowhere states the term joint venture or any intent to establish a joint venture. Rather, the Loan Agreement and deed of trust evidence that KS Ventures intended to loan money to Russell secured by certain real properties, and Russell intended to unconditionally repay the loan advances he received. KS Ventures unequivocally owned Russell’s debt; Russell and KS Ventures did not share an

equal right of control. The District Court properly determined that the Loan Agreement did not create a joint venture between KS Ventures and Russell.

¶17 In sum, Russell failed to raise a genuine issue of material fact. The District Court properly denied Russell's request to reschedule oral argument and granted summary judgment in favor of KS Ventures.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶19 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE

1 Robert B. Allison, District Judge
2 Department No. 2
3 Flathead County Justice Center
4 920 South Main Street, Suite 310
5 Kalispell, Montana 59901
6 Telephone: (406) 758-5906

7 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

8 KS VENTURES LLC,

9 Plaintiff,

10 vs.

11 WILLIAM M. RUSSELL, ET AL.,

12 Defendant.

Cause No. DV-16-0389-BC

ORDER DENYING DEFENDANT'S
MOTION TO RESCHEDULE HEARING
FOR ORAL ARGUMENT

13 This matter is before the Court on Defendant's Motion to Reschedule Hearing for Oral
14 Argument, which was filed on March 5, 2018. Plaintiff filed a Brief in Opposition to
15 Defendant's Motion to Reschedule Oral Argument on March 14, 2018. Defendant did not file a
16 reply brief. On the basis of the record before the Court and for good cause, the Court hereby
17 orders as follows:

18 ORDER

19 IT IS HEREBY ORDERED that Defendant's Motion to Reschedule Hearing for Oral
20 Argument is DENIED.

21 RATIONALE

22 Plaintiff filed a Motion for Summary Judgment on July 21, 2017, and Defendant William
23 M. Russell ("Defendant") filed his Response in Opposition on August 10, 2017. Plaintiff filed a
24 Reply on September 5, 2017. Additional briefing from the parties on the Motion for Summary
25 Judgment followed.

26 ORDER DENYING DEFENDANT'S
27 MOTION TO RESCHEDULE HEARING
28 FOR ORAL ARGUMENT

1 Defendant filed a Request for Oral Argument on Plaintiff's Motion for Summary
2 Judgment on October 16, 2017, which the Court denied on December 1, 2017, based upon the
3 failure to make a timely request for oral argument. Defendant then filed a Motion for Relief of
4 Order Denying Request for Oral Argument ("Motion for Relief"), and on February 16, 2018,
5 this Court thereafter granted Defendant's Motion for Relief, granted oral argument on Plaintiff's
6 Motion for Summary Judgment, and scheduled oral argument to take place on March 2, 2018, at
7 11:00 a.m. See Order Granting Motion for Relief of Order Denying Request for Oral Argument,
8 Doc. No. 110. On February 16, 2018, the Court mailed its Order granting oral argument to
9 Defendant at his address on file with the Court (7435 Highway 2 East, Columbia Falls, MT
10 59912).

13 At the scheduled date and time, March 2, 2018, at 11:00 a.m., Plaintiff's counsel, Martin
14 S. King appeared for oral argument on Plaintiff's Motion for Summary Judgment, but Defendant
15 failed to appear for oral argument. Before concluding the hearing, the Court waited
16 approximately ten (10) minutes for Defendant to appear, and he did not appear. Thereafter, the
17 Court deemed that Defendant waived oral argument on Plaintiff's Motion for Summary
18 Judgment, and the Court entered its Order Granting Plaintiff's Motion for Summary Judgment.
19 See Order Granting Plaintiff's Motion for Summary Judgment, Doc. No. 112.

22 On March 2, 2018, Defendant filed his Motion to Reschedule Hearing on Oral Argument
23 ("Motion to Reschedule"), which is now before the Court. Defendant does not cite a specific
24 rule pursuant to which he requests relief, but since he bases his Motion to Reschedule upon
25 excusable neglect and since this Court has entered summary judgment in favor of Plaintiff, this
26 Court assumes that Defendant seeks relief pursuant to M. R. Civ. P. 60(b)(1). Defendant's
27 Motion to Reschedule does not meet the standard for relief under Rule 60(b)(1).
28

ORDER DENYING DEFENDANT'S
MOTION TO RESCHEDULE HEARING;
FOR ORAL ARGUMENT

1 M. R. Civ. P. 60(b)(1) provides a party relief from a "final judgment, order, or
2 proceeding" when the party shows "mistake, inadvertence, surprise, or excusable neglect." M.
3 R. Civ. P. 60(b)(1). However, "[l]itigants have a duty to monitor litigation," and relief from a
4 judgment or order is not appropriate "where the facts establish 'careless conduct or willful
5 ignorance.'" *Puhto v. Smith Funeral Chapels, Inc.*, 362 Mont. 447, 450, 264 P.3d 1142 (2011).
6 "[M]istake," "inadvertence," and "excusable neglect" generally require some justification for an
7 error beyond mere carelessness or ignorance of the law." *Empire Lath & Plaster v. American*
8 *Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276 (1992). Further, Rule 60 may not be used to
9 argue the reconsideration of a previous motion on its merits because Montana law does not
10 recognize motions for reconsideration. *Horton v. Horton*, 2007 MT 181, 338 Mont. 236, 165
11 P.3d 1076 (2007); *Jones v. Montana University System*, 2007 MT 82, 337 Mont. 1, 155 P.3d
12 1247 (2007).

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15 Defendant argues that he missed the scheduled hearing on Plaintiff's Motion for
16 Summary Judgment due to excusable neglect. Defendant states that he has been in Arizona
17 since late December 2017 and that he has not been at his residence "to watch for mailed
18 notifications of further actions." Defendant then states that he has emailed and called the Clerk
19 of Court's office to determine whether the Court had ruled upon his Motion for Relief of Order
20 Denying Request for Oral Argument. Defendant stresses that he also requested that the Clerk of
21 Court email him notifications in his case. Defendant states that the last phone call he made to
22 the Clerk of Court was on February 16, 2018, at which time he was informed that a ruling had
23 not been entered yet. Defendant then acknowledges that he "should have called again the
24 following week," but he argues that he "unintentionally neglected to do so." He avers that "the
25 task merely slipped my mind." He also acknowledges that the "wasted time and resources" that
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ORDER DENYING DEFENDANT'S
MOTION TO RESCHEDULE HEARING
FOR ORAL ARGUMENT

1 occurred due to his absence from the hearing, and he goes on to argue the merits of Plaintiff's
2 Motion for Summary Judgment once again.

3 Plaintiff opposes Defendant's Motion to Reschedule. Plaintiff notes that Defendant does
4 not dispute the fact that the Court mailed the order scheduling oral argument to his address listed
5 on his pleadings. Plaintiff argues that Defendant's excuses are insufficient, especially
6 considering that he could have taken steps to ensure that he received correspondence from the
7 Court, including filing a change of address with the Court. Plaintiff also notes that "Plaintiff's
8 counsel traveled 240 miles round-trip to Kalispell for the hearing, through inclement weather,
9 having no prior notice that the Defendant Russell would not appear, even though the hearing
10 was being held specifically at Mr. Russell's request."

11 Defendant asserts that his neglect was excusable, but the facts belie this argument.
12 Defendant filed his Motion for Relief of Order Denying Request for Oral Argument, and at
13 some point, Defendant apparently traveled out of state for an extended period of time.
14 Defendant did not change his mailing address with the Court and presumably did not file a
15 request with the U.S. Post Office to temporarily forward his mail.¹ Defendant acknowledges
16 that he called the Clerk of Court to inquire as to the status of his Motion for Relief of Order
17 Denying Request for Oral Argument, but he asserts that he simply forgot to call after February
18 16, 2018.²

19 Defendant had a duty to monitor this litigation, particularly to monitor the status of his
20 motion requesting relief and oral argument. The Court provided Defendant with notice of the
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27 ¹ Defendant's Motion to Reschedule does not address whether he requested that his mail be forwarded by the U.S.
28 Post Office, but in light of the facts asserted in Defendant's Motion to Reschedule, the Court assumes that he did not.

² Since the Court signed its Order granting oral argument on February 16, 2018, it appears that Defendant called the Clerk of Court's office before the Order made its way from chambers to the Clerk's office.

ORDER DENYING DEFENDANT'S
MOTION TO RESCHEDULE HEARING
FOR ORAL ARGUMENT

1 hearing date and time at his address on file with the Court, which is the address included on
2 Defendant's Motion for Relief of Order Denying Request for Oral Argument. Defendant's
3 failure to provide the Court with a current address, to forward his mail, or to call the Clerk of
4 Court is mere carelessness, not excusable neglect, and Rule 60 does not provide relief from a
5 judgment due to mere carelessness. Defendant seems to suggest that the Clerk of Court should
6 have emailed him notice of the hearing, but email notification is not a duty of the Clerk's office
7 and is not a requirement of the rules of this Court. Additionally, Defendant's arguments
8 regarding the substantive reasons why Plaintiff's Motion for Summary Judgment should not
9 have been granted simply asks for reconsideration, and motions for reconsideration are not
10 allowed under Montana law.
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13 Accordingly, Defendant has not presented sufficient facts to establish his excusable
14 neglect with regards to his failure to appear at the hearing on Plaintiff's Motion for Summary
15 Judgment. Instead, the facts show mere careless conduct and a failure to properly monitor this
16 litigation. The Court and Plaintiff expended time and resources on the scheduled hearing at
17 which Defendant failed to appear, and the Court sees no reason that justifies vacating the
18 judgment and rescheduling the hearing. Defendant's Motion to Reschedule is therefore denied.
19

20 DATED this 29th day of March, 2018.

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22 
23 Robert B. Allison
24 District Judge

25 cc: Martin S. King
26 Victoria Francis
27 William M. Russell
28

ORDER DENYING DEFENDANT'S
MOTION TO RESCHEDULE HEARING
FOR ORAL ARGUMENT

✓

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2 Department No. 2
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7 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

8 KS VENTURES, LLC, an Arizona limited
9 liability company,

10 Plaintiff,

11 vs.

12 WILLIAM M. RUSSELL; K.E. SMITH
13 REVOCABLE TRUST; MYERS
14 REVOCABLE TRUST; KIM RUSSELL;
15 SHARON HUFF; BEN WEIDLING; THE
16 LAMAR COMPANIES; U.S. TREASURY
17 by and through the INTERNAL REVENUE
18 SERVICE; MONTANA SWEETGRASS
19 RANCH HOMEOWNERS'
20 ASSOCIATION, INC.; DOE
21 DEFENDANTS 1 THROUGH X inclusive,

22 Defendants.

23 Cause No. DV-16-389B

24 ORDER GRANTING PLAINTIFF'S
25 MOTION FOR SUMMARY JUDGMENT

26 This matter comes before the Court upon Plaintiff's Motion for Summary Judgment filed
27 on July 21, 2017. Defendant William Russell (hereinafter "Defendant") filed a Response on
28 August 10, 2017. Plaintiff filed a Reply on September 5, 2017. Defendant filed an Amended
Answer to Plaintiff's Second Amended Complaint and Response to Plaintiff's Reply on October
20, 2017, and Plaintiff filed a Brief in Opposition to this Amended Answer and Response on
November 3, 2017. Plaintiff seeks collection and judicial foreclosure and requests the Court

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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APPENDIX
"F"

1 enter judgment on a loan agreement and unconditional loan guarantee and foreclose on certain
2 real property located in Flathead County.

3 On October 16, 2017, Defendant filed a Request for Oral Argument on Plaintiff's
4 Motion for Summary Judgment, and on December 1, 2017, this Court entered its Order Denying
5 Request for Oral Argument based upon the failure to make a timely request for oral argument.
6 On December 21, 2017, Defendant filed a Motion for Relief of Order Denying Request for Oral
7 Arguments, wherein Defendant argued that he had properly and timely requested oral argument
8 within the body of his opposition brief. This Court granted said motion and granted oral
9 argument in its Order Granting Motion for Relief of Order Denying Request for Oral Argument
10 ("Order Granting Oral Argument"), which was entered on February 16, 2018. In its Order
11 Granting Oral Argument the Court scheduled oral argument on Plaintiff's Motion for Summary
12 Judgment to take place on March 2, 2018, at 11:00 a.m. On February 16, 2018, the Court
13 mailed its Order Granting Oral Argument to Defendant at his address on file with the Court
14 (7435 Highway 2 East, Columbia Falls, MT 59912).
15

16
17 At the scheduled date and time, March 2, 2018, at 11:00 a.m., Plaintiff's counsel, Martin
18 S. King appeared for oral argument on Plaintiff's Motion for Summary Judgment, but Defendant
19 failed to appear for oral argument. Before concluding the hearing, the Court waited
20 approximately ten (10) minutes for Defendant to appear, and he did not appear. Thus, the Court
21 deems that Defendant waived oral argument on Plaintiff's Motion for Summary Judgment.
22

23 Accordingly, on the basis of said Motion for Summary Judgment, supporting and
24 opposition memoranda, and all other pleadings filed to date, the Court, being fully advised in the
25 premises, makes the following:
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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1 ORDER

2 This Court, finding there are no genuine issues of material fact and that Plaintiff is
3 entitled to judgment as a matter of law, hereby GRANTS Plaintiff's Motion for Summary
4 Judgment. Plaintiff's counsel shall submit the appropriate judgment document.

5 STANDARD OF REVIEW

6 Summary Judgment is appropriate when the moving party demonstrates the absence of
7 genuine issue of material fact and entitlement to judgment as a matter of law. M. R. Civ. P.
8 56(c)(3); *Dubiel v. Mont. Dep't of Transp.*, 2012 MT 35, ¶ 10, 364 Mont. 175, 272 P.3d 66.
9 The party moving for summary judgment bears the initial burden of establishing both the
10 absence of genuine issues of material fact and entitlement to judgment as a matter of law.
11 *Miller v. Begley*, 2011 MT 230, ¶10, 362 Mont. 115, 262 P.3d 1085. After the moving party
12 meets its burden, the burden shifts to the party opposing summary judgment either to show a
13 triable issue or to show why the undisputed facts do not entitle the moving party to judgment.
14 *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71.
15

16 RATIONALE

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19 **I. Plaintiff demonstrated the prima facie elements necessary for collection and
20 foreclosure and is thus entitled to summary judgement.**

21 Plaintiff presented evidence showing that Defendant signed a Loan Agreement with
22 Karen Smith and that this Loan Agreement was assigned to Plaintiff. Plaintiff also presented
23 evidence showing that Defendant failed to pay obligations under the terms of this Loan
24 Agreement. Summary judgment is proper.

25 Under Montana law, "[i]f the prima facie elements for collection and foreclosure are
26 satisfied, summary judgement is appropriate." *First Security Bank v. Abel*, 238 Mont. 335, 336
27 779 P.2d 48,49 (1989). Collection and foreclosure actions require proof of the following:
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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

- 1 (1) Debt of the defendants;
2 (2) Nonpayment of the debt; and
3 (3) Present ownership of the debt by the complaining party.

4 *First National Bank of Albuquerque v. Quinta Land and Cattle Co.*, 238 Mont 335, 779 P.2d 48
5 (1989).

6 Here, Plaintiff seeks collection on the "Loan Agreement and Unconditional Loan
7 Guarantee between Bill Russell and Karen Smith Regarding the Payment of Certain Loans
8 Karen Has Made to Bill" (hereinafter the "Loan Agreement") and judicial foreclosure, as a
9 mortgage, of a Deed of Trust securing the loan and encumbering the real property located in
10 Flathead County, more particularly described as follows:

11 PARCEL 1:

12 THE NORTH HALF OF GOVERNMENT LOT 3 OF SECTION 17, TOWNSHIP 27
13 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD COUNTY, MONTANA.

14 PARCEL 2:

15 THE SOUTH HALF OF GOVERNMENT LOT 2 OF SECTION 17, TOWNSHIP 27
16 NORTH, RANGE 21 WEST, P.M.M. FLATHEAD COUNTY, MONTANA.

17 PARCEL 3:

18 THE SOUTH HALF OF GOVERNMENT LOT 3 OF SECTION 17, TOWNSHIP 27
19 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD COUNTY, MONTANA,

20 AND

21 THE NORTH HALF OF GOVERNMENT LOT 4 OF SECTION 17, TOWNSHIP 27
22 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD COUNTY, MONTANA,

23 PARCEL 4:

24 TRACT A OF CERTIFICATE OF SURVEY NO. 17584, LOCATED IN THE WEST
25 HALF OF THE NORTHEAST QUARTER OF SECTION 15, TOWNSHIP 30 NORTH,
26 RANGE 20 WEST, P.M.M., FLATHEAD COUNTY, MONTANA.

27 PARCEL 5:

28 LOTS 4,5,7,8,9,15,16,17,18,28,29,30,31 AND 32 OF SWEETGRASS RANCH,
ACCORDING TO THE MAP OR PLAT THEREOF ON FILE AND OF RECORD IN

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1 THE OFFICE OF THE CLERK AND RECORDER OF FLATHEAD COUNTY,
2 MONTANA.

3 AND

4 ALL OPEN SPACES, COMMON AREA AND PRIVATE ROADWAYS OF
5 SWEETGRASS RANCH, ALL LOCATED IN THE NE1/4 OF SECTION 33,
6 TOWNSHIP 29 NORTH, RANGE 20 WEST, ACCORDING TO THE OFFICIAL MAP
7 OR PLAT THEROF ON FILE AND OF RECORD IN THE OFFICE OF THE CLERK
8 AND RECORDER OF FLATHEAD COUNTY, MONTANA.

9 together with all existing or subsequently erected or affixed buildings, improvements and
10 fixtures; all easements, rights of way, and appurtenances; all water, water rights and
11 ditch rights (including stock in utilities with ditch or irrigation rights); and all other
12 rights, royalties, and profits relating to the real property.

13 (hereinafter the "Mortgaged Property"). Plaintiff seeks collection and foreclosure of all of the
14 above named Mortgaged Property as well as all other collateral from the Mortgaged Property.

15 The Loan Agreement, dated April 25, 2013, provided for a revolving line of credit up to
16 \$5,000,000, and Defendant signed this Loan Agreement. On the same date, Karen Smith signed
17 an Assignment and Allonge, assigning all of her right, title, and interest in the Loan Agreement
18 to Plaintiff. Further, Defendant signed a Deed of Trust in favor of Plaintiff on June 14, 2013,
19 which secured payment and performance of the Loan Agreement and listed the Mortgaged
20 Property, and on June 25, 2013, the Flathead County, Montana Clerk and Recorder recorded this
21 Deed of Trust.

22 Plaintiff presented evidence of various disbursements made under the terms of the Loan
23 Agreement, disbursements which Defendant has not paid and is in default on the Loan
24 Agreement. Plaintiff also presented evidence that Defendant failed to adhere to certain
25 conditions and covenants in the Loan Agreement, including his failure to pay real property taxes
26 and failure to keep other loans on the Mortgaged Property current.
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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1 The terms of the Loan Agreement included a provision whereby if Defendant did not
2 make payments due and did not comply with the conditions and covenants in the Loan
3 Agreement, then all of the debt secured by the Deed of Trust would be accelerated and become
4 immediately due. As a result, the Mortgaged Property and other collateral could be foreclosed
5 for the full amount due plus any of Plaintiff's attorneys' fees and expenses. Based upon the
6 evidence presented, the amount due and owing on the Loan Agreement as of July 20, 2017, was
7 \$1,225,550.90, which does not include any related attorneys' fees and expenses for the
8 foreclosure action. Accordingly, because Plaintiff demonstrated that Defendant owes this debt
9 to Plaintiff, that the debt has not been paid, and that Plaintiff is the owner of the debt, summary
10 judgment is appropriate for Plaintiff.
11

12 Further, Plaintiff seeks interest on the past due amount as of July 20, 2017. A party
13 "who is entitled to recover damages certain . . . is entitled also to recover interest on the
14 damages from that day . . ." M.C.A. § 27-1-211. Additionally, "unless there is an express
15 contract in writing fixing a different rate . . . , interest is payable on all money at the rate of 10%
16 a year after it becomes due on: (a) any instrument of writing . . . ; (b) an account stated; (c)
17 money lent or due on any settlement of accounts from the date on which the balance is
18 ascertained; and (d) money received for the use of another person and detained from that
19 person." M.C.A. § 31-1-106. The Loan Agreement does not include any provision fixing an
20 interest rate. Thus, Plaintiff is entitled to interest at the rate of 10% per annum from July 20,
21 2017.
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1 **II. Defendant's arguments in opposition to Plaintiff's Motion for Summary**
2 **Judgment are not persuasive.**

3 Throughout Defendant's various briefs, Defendant presents numerous arguments in
4 opposition to Plaintiff's Motion for Summary Judgment. None of Defendant's arguments are
5 persuasive.
6

7 First, Defendant argues that the documents in this case do not show that Plaintiff was
8 Defendant's lender, but instead that Defendant and Karen Smith entered into a joint venture.¹
9 Defendant's basis for this argument is the marriage and prenuptial agreement between him and
10 Karen Smith. Defendant also references the fact that, during their marriage, their money was
11 co-mingled, and Defendant points to the lack of any receipts for payments made on the Loan
12 Agreement, citing M.C.A. § 32-5-304.
13

14 As an initial matter, the Court notes that although "an advance of money" or "transfer of
15 title to property from one spouse to the other is presumed to be a gift," this presumption is one
16 that "may be rebutted by competent evidence." *Baird v. Baird*, 125 Mont. 122, 232 P.2d 348
17 (1951). Regarding joint ventures, "a contract is . . . necessary as between the parties," and "the
18 relationship of joint adventurers is a matter of intent, and arises only where they intend to
19 associate themselves as such." *Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941). Based
20 upon the prenuptial agreement, Loan Agreement, Deed of Trust, and other evidence in this case,
21 it is clear that Defendant and Karen Smith married and that Karen Smith thereafter loaned
22 Defendant sums of money in accordance with a written Loan Agreement and Deed of Trust,
23 which was assigned to Plaintiff. None of the evidence suggests that Karen Smith (or Plaintiff)
24 which was assigned to Plaintiff. None of the evidence suggests that Karen Smith (or Plaintiff)
25

26
27 ¹ Defendant argues that even if there was a lender/borrower relationship, a question of law exists as to whether
28 Plaintiff breached a fiduciary duty to him. Defendant presents no evidence of this alleged breach of fiduciary duty,
 so his conclusory statement that a breach occurred is not persuasive in opposition to Plaintiff's Motion for
 Summary Judgment.

1 provided Defendant with a gift of money or that Karen Smith (or Plaintiff) entered into a joint
2 venture with Defendant. Specifically, the prenuptial agreement shows an intent for marriage,
3 and the Loan Agreement and Deed of Trust show an intent to loan money secured by certain real
4 property. These documents do not show an intent for a joint venture as would be required for
5 such to arise. Additionally, Defendant's reference to the co-mingling of money and lack of
6 receipts, citing M.C.A. § 32-5-304, does not persuade the Court that the parties were in a joint
7 venture. M.C.A. § 32-5-304 is not applicable here as it relates to businesses in the consumer
8 loan business.
9

10
11 Second, Defendant argues that his signature on the Loan Agreement may be a stamp
12 rather than his actual signature. However, Defendant presents no evidence to support this
13 contention. Once the moving party on a motion for summary judgment shows a lack of genuine
14 issues of fact, the non-moving party has the burden of presenting "substantial evidence, not mere
15 speculation and conclusory statements," to establish that genuine issues of fact remain. *Farm*
16 *Credit Bank v. Hill*, 266 Mont. 258, 879 P.2d 1158 (1993). Defendant's argument that his
17 signature on the Loan Agreement may be a stamp is nothing more than speculation without any
18 evidence to support it. Moreover, Plaintiff presented evidence from a prior action wherein
19 Defendant admitted that the signature on the Loan Agreement was his signature.
20
21

22 Third, Defendant argues that the Loan Agreement was not a loan agreement because he
23 never signed a promissory note, and he argues that the Deed of Trust requires a promissory note.
24 In support of these arguments, Defendant cites M.C.A. §§ 32-5-303, 32-5-301, 32-5-305, and
25 32-2-415. None of these statutes are applicable to Plaintiff and this case. M.C.A. §§ 32-5-303,
26 32-5-301, and 32-5-305 apply to consumer loan businesses, and Defendant has presented no
27 evidence to show that Plaintiff was engaged in the consumer loan business or that the loans
28

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1 related to real property should be considered consumer loans. M.C.A. § 32-2-415 applies to
2 building and loan associations, and there is no evidence that Plaintiff was a building and loan
3 association.

4
5 Fourth, Defendant argues that he signed the Deed of Trust in order to protect his wife's
6 assets. Regardless of Defendant's personal reasoning for signing the Deed of Trust, Defendant
7 does not dispute that he signed the Deed of Trust, which specifically references the Loan
8 Agreement and refers to Plaintiff as the Lender.


9
10 Fifth, Defendant argues that there was never any consideration for these agreements and
11 cites M.C.A. § 28-2-301. Defendant's argument that there was no consideration for the
12 agreements is unpersuasive in light of his admission that Karen Smith put forth money on his
13 behalf. M.C.A. § 28-2-301 may be relevant to the issue of whether there was free, mutual, and
14 communicated consent to these agreements, but Defendant has presented no evidence that he
15 signed the Loan Agreement and Deed of Trust under any sort of duress or that the appropriate
16 consent was not present for these agreements.

17
18 Finally, Defendant argues that Plaintiff had a duty of care and of good faith and fair
19 dealing pursuant to M.C.A. §§ 28-1-201 and 28-1-211 and that she breached these duties.
20 However, Defendant fails to present any evidence of Plaintiff's alleged breach of these duties.
21 Instead, Defendant merely provides the Court with speculation and conclusory statements,
22 which is not sufficient to meet his burden in opposing Plaintiff's Motion for Summary
23 Judgment.

24
25 The evidence shows the following: 1) Defendant's admission that he signed the Loan
26 Agreement and Deed of Trust, 2) Karen Smith's assignment of the Loan Agreement to Plaintiff,
27 3) Plaintiff's reference in the Loan Agreement as the Lender, 4) the Loan Agreement's reference
28

1 in the Deed of Trust, 5) Defendant's admission that Karen Smith put forth money on his behalf,
2 and 6) Defendant's failure to dispute that he did not repay the money loaned to him when due
3 and is now in default. Accordingly, summary judgment in favor of Plaintiff is proper.
4

5 DATED this 2nd day of March, 2018.

6
7 
8 Robert B. Allison
9 District Judge

10 cc: Martin S. King
11 William Russell
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clipped

*Postmarked: 3/12/18
Mail Recd on: 3/15/18 @ C Falls P.O.
Dated 3/9/18*

1 Hon. Robert B. Allison
2 District Judge
3 Department No. 2
4 Flathead County Justice Center
5 920 South Main Street, Suite 310
6 Kalispell, Montana 59901
7 Telephone: 406-758-5906

8 MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
9 FLATHEAD COUNTY

10 KS VENTURES, LLC, an Arizona limited
11 liability company,

12 Plaintiff,

13 -vs-

14 WILLIAM M. RUSSELL; K.E. SMITH
15 REVOCABLE TRUST; MYERS
16 REVOCABLE TRUST; KIM RUSSELL;
17 SHARON HUFF; BEN WEIDLING; THE
18 LAMAR COMPANIES; U.S. TREASURY
19 by and through the INTERNAL REVENUE
20 SERVICE; MONTANA SWEETGRASS
21 RANCH HOMEOWNERS' ASSOCIATION,
22 INC.; DOE DEFENDANTS I THROUGH X
23 inclusive,

24 Defendants,

Robert B. Allison
Cause No. DV-16-389B

AMENDED FINAL
JUDGMENT

**(INCLUDING MONETARY
JUDGMENT, DEFAULT
JUDGMENT, ORDER, DECREE
OF FORECLOSURE AND
ORDER OF SALE)**

25 This matter is before the Court on Plaintiff's Motion for Entry of Final
26 Judgment Including Request for Default Judgment ("Plaintiff's motion"), in which
the Plaintiff KS Ventures, LLC (hereafter "KS" or "Plaintiff"), is requesting that a
final judgment, decree of foreclosure and order of sale, including a default
judgment, be entered in this collection and judicial foreclosure action.

Having reviewed the Plaintiff's motion and supporting brief, and the

FINAL JUDGMENT

Page 1

APPENDIX
G

1 affidavit of Karen E. Smith attached thereto, and based on the Court's Order
2 Granting Plaintiff's Motion for Summary Judgment dated March 2, 2018, the
3 defaults on file, and based on the stipulations between the Plaintiff and the
4 Defendant United States Department of Treasury by and through the Internal
5 Revenue Service (IRS), and between the Plaintiff and Defendant K.E. Smith
6 Revocable Trust, each previously filed, the Plaintiff's Motion for Entry of Final
7 Judgment Including Request for Default Judgment, is hereby **Granted**.

8 **MONETARY JUDGMENT**

9 **(Against Defendant William M. Russell)**

10 1. A monetary judgment is hereby entered in favor of the Plaintiff KS
11 Ventures LLC, and against the Defendant William M. Russell, under the "Loan
12 Agreement and Unconditional Loan Guarantee dated April 25, 2013" ("Loan
13 Agreement"), a copy which is attached to Plaintiff's Second Amended Complaint
14 as Exhibit "B", in the principal sum of one million, three hundred seventy eight
15 thousand, three hundred seventy eight and 81/100 dollars (\$1,378,378.81), which
16 sum is now the principal balance of the judgment, with interest to accrue against
17 the principal balance of the judgment, i.e. \$1,378,378.81, at the rate of 7.5% per
18 annum beginning January 3, 2018 until paid.

19 2. In addition to the sums set forth in paragraph 1, the monetary judgment
20 against the Defendant William M. Russell, and the balance thereof, shall also
21 include the Plaintiff's costs, expenses, and reasonable attorney fees which shall
22 also accrue interest at the rate of 7.5 % per annum beginning from the date of this
23 Final Judgment.

24 3. Plaintiff shall submit its memorandum of taxable costs within 5 business
25 days from the date of this Amended Final Judgment pursuant to §25-10-501, MCA.
26 Plaintiff will submit its application for expenses and attorney fees within 14 days
27 from the date of this Amended Final Judgment pursuant to Rule 54(d) of the

1 Montana Rules of Civil Procedure. If a timely objection is filed, the Court will set
2 the matter for a hearing. If no objection is filed, the Court will review and determine
3 Plaintiff's application for costs, expenses and fees based on the applicable statutory
4 criteria.

5 **DEFAULT JUDGMENT**

6 4. Default judgment is hereby granted in favor of Plaintiff KS Ventures and
7 against Defendants Myers Revocable Trust; Kim Russell; Sharon Huff; Ben
8 Weidling; the Lamar Companies and Montana Sweetgrass Ranch Homeowners'
9 Association, Inc. Each of said Defendants were served with the amended
10 complaint and summons on the dates stated (copies of the returns of service and
11 acknowledgments of service each been filed with this Court) and, after failing to
12 appear, their defaults were properly entered by the Clerk of Court on the dates
13 indicated.

14 **STIPULATED JUDGMENT**

15 5. Defendant U.S. Treasury through the Internal Revenue Service ("IRS"),
16 holds an inferior lien to the Deed of Trust held by the Plaintiff on the underlying
17 Mortgage Property pursuant to a Notice of Federal Tax Lien that was recorded
18 with the Flathead County Clerk and Recorder on January 6, 2016 as document
19 number 2016000000082. The IRS was served with process and has made an
20 appearance through counsel. On October 12, 2016 and July 19, 2017 respectively,
21 the Plaintiff and the IRS executed and filed two Stipulations. Said Stipulations
22 were approved by the Court by Orders dated October 19, 2016 and July 25, 2017
23 respectively. Based on said Stipulations, Plaintiffs Mortgage lien in the Mortgage
24 Property pursuant to the Deed of Trust held by Plaintiff as described herein is
25 declared to be superior in priority to the IRS lien in the Mortgage Property and the
26 IRS lien in the Mortgage Property may be foreclosed, subject to the terms of the

1 Stipulations including the IRS right of redemption, as described herein.

2 6. Defendant K.E. Smith Revocable Trust ("KE") consented to entry of
3 Summary Judgment and to a Judgment, Decree of Foreclosure and Order of Sale,
4 through a Stipulation filed with the Court on July 24, 2017. Through said
5 stipulation KE acknowledged that KE's interest in a portion of the Mortgage
6 Property, namely Parcels 1 and 2 described below, is subject to the Deed of Trust
7 held by the Plaintiff, and that the interest of KE in said Parcels 1 and 2 may be
8 foreclosed through this judicial foreclosure action although KE will retain a right
9 of redemption and right to any proceeds payable to the owner or owners of Parcels
10 1 or 2 to the Mortgage Property.

11 **ORDER**

12 7. The interest of each of the Defendants in the Mortgage Property, said
13 Mortgage Property which is more particularly described as follows:

14 **PARCEL 1:**

15 THE NORTH HALF OF GOVERNMENT LOT 3 OF SECTION 17,
16 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

17 **PARCEL 2:**

18 THE SOUTH HALF OF GOVERNMENT LOT 2 OF SECTION 17,
19 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

20 **PARCEL 3:**

21 THE SOUTH HALF OF GOVERNMENT LOT 3 OF SECTION 17,
22 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

23 **AND**

24 THE NORTH HALF OF GOVERNMENT LOT 4 OF SECTION 17,
25 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.
26 **PARCEL K OF CERTIFICATE OF SURVEY NO. 16282**

1 PARCEL 4:

2 TRACT A OF CERTIFICATE OF SURVEY NO. 17584, LOCATED IN
3 THE WEST HALF OF THE NORTHEAST QUARTER OF SECTION 15,
4 TOWNSHIP 30 NORTH, RANGE 20 WEST, P.M.M., FLATHEAD
5 COUNTY, MONTANA.

6 PARCEL 5:

7 LOTS 4, 5, 7, 8, 9, 15, 16, 17, 18, 28, 29, 30, 31 AND 32 OF
8 SWEETGRASS RANCH, ACCORDING TO THE MAP OR PLAT
9 THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE
10 CLERK AND RECORDER OF FLATHEAD COUNTY, MONTANA.

11 AND

12 ALL OPEN SPACES, COMMON AREA AND PRIVATE ROADWAYS
13 OF SWEETGRASS RANCH, ALL LOCATED IN THE NE1/4 OF
14 SECTION 33, TOWNSHIP 29 NORTH, RANGE 20 WEST, ACCORDING
15 TO THE OFFICIAL MAP OR PLAT THEREOF ON FILE AND OF
16 RECORD IN THE OFFICE OF THE CLERK AND RECORDER OF
17 FLATHEAD COUNTY, MONTANA.

18 together with all existing or subsequently erected or affixed buildings,
19 improvements and fixtures; all easements, rights of way, and appurtenances;
20 all water, water rights and ditch rights (including stock in utilities with ditch
21 or irrigation rights); and all other rights, royalties, and profits relating to the
22 real property.

23 (hereinafter referred to as the "Real Property" or "Mortgaged Property")

24 is hereby declared inferior to the Mortgage lien held by Plaintiff under the Deed of
25 Trust dated June 14, 2013 and recorded June 25, 2013, as Document No.

26 201300015492, Flathead County Clerk and Recorder, and attached to Plaintiff's
Second Amended Complaint as Exhibit C, ("Plaintiff's Mortgage"), the sole
exception being the mortgage executed in favor of the Myers Revocable Trust
against Parcel 3, recorded at 2009-000-07502, which mortgage is held to be
superior in priority to the Plaintiff's Mortgage on Parcel 3 only.

8. Except for the mortgage held by the Myers Revocable Trust on Parcel 3,
the Plaintiff's Mortgage lien under Plaintiff's Mortgage (i.e. the Deed of Trust
dated June 14, 2013 and recorded June 25, 2013, as Document No. 201300015492
Flathead County Clerk and Recorder) is hereby declared a first priority mortgage

1 lien on the entirety of the Mortgaged Property, subject only to real property taxes
2 and assessments, and Plaintiff's Mortgage may be foreclosed through a Sheriff's
3 Sale, foreclosing any and all right, title and interest of the Defendant William M.
4 Russell, and the interests of each of the other Defendants, and all other persons, in
5 and to all and every portion of the Mortgage Property and all appurtenances,
6 subject to any right of redemption, including the rights of the Defendant IRS as
7 provided by Title 28 U.S.C. Section 2410 and the Stipulations on file in this
8 action. The sole exception is Parcel 3 in which the Plaintiff's Mortgage lien, and
9 this foreclosure, is deemed to be "subject to" the Mortgage executed in favor of
10 the Myers Revocable Trust.

11 **ORDER AND DECREE OF FORECLOSURE**

12 9. Based on Plaintiff's showing of the right to a judgment and decree of
13 foreclosure in this cause, the Court orders that the Mortgage held by the Plaintiff,
14 specifically the Deed of Trust dated June 14, 2013, recorded June 25, 2013, as
15 Document No. 201300015492, Flathead County, and encumbering the Mortgaged
16 Property owned by the Defendant William M. Russell, specifically:

17 **PARCEL 1:**

18 THE NORTH HALF OF GOVERNMENT LOT 3 OF SECTION 17,
19 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

20 **PARCEL 2:**

21 THE SOUTH HALF OF GOVERNMENT LOT 2 OF SECTION 17,
22 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

23 **PARCEL 3:**

24 THE SOUTH HALF OF GOVERNMENT LOT 3 OF SECTION 17,
25 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
26 COUNTY, MONTANA.

AND

1 THE NORTH HALF OF GOVERNMENT LOT 4 OF SECTION 17,
2 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
3 COUNTY, MONTANA. PARCEL K OF CERTIFICATE OF
4 SURVEY NO. 16282

5 PARCEL 4:

6 TRACT A OF CERTIFICATE OF SURVEY NO. 17584, LOCATED IN
7 THE WEST HALF OF THE NORTHEAST QUARTER OF SECTION 15,
8 TOWNSHIP 30 NORTH, RANGE 20 WEST, P.M.M., FLATHEAD
9 COUNTY, MONTANA.

10 PARCEL 5:

11 LOTS 4, 5, 7, 8, 9, 15, 16, 17, 18, 28, 29, 30, 31 AND 32 OF
12 SWEETGRASS RANCH, ACCORDING TO THE MAP OR PLAT
13 THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE
14 CLERK AND RECORDER OF FLATHEAD COUNTY,
15 MONTANA.

16 AND

17 ALL OPEN SPACES, COMMON AREA AND PRIVATE ROADWAYS
18 OF SWEETGRASS RANCH, ALL LOCATED IN THE NE1/4 OF
19 SECTION 33, TOWNSHIP 29 NORTH, RANGE 20 WEST, ACCORDING
20 TO THE OFFICIAL MAP OR PLAT THEREOF ON FILE AND OF
21 RECORD IN THE OFFICE OF THE CLERK AND RECORDER OF
22 FLATHEAD COUNTY, MONTANA.

23 together with all existing or subsequently erected or affixed buildings,
24 improvements and fixtures; all easements, rights of way, and appurtenances;
25 all water, water rights and ditch rights (including stock in utilities with ditch
26 or irrigation rights); and all other rights, royalties, and profits relating to the
real property.

(Hereinafter referred to as the "Real Property" or "Mortgaged Property").

is a first and prior lien on the Mortgage Property (except the mortgage executed in
favor of the Myers Revocable Trust on Parcel 3), superior to any lien, right, title,
claim or interest of any of the Defendants, their successors or assigns, anybody
occupying the Mortgage Property, and any and all other person or persons, save
and except for the right of redemption as allowed by law and real property taxes
and assessments owing to Flathead County, and including the rights of the
Defendant IRS as provided by Title 28 U.S.C. Section 2410 and the Stipulations

1 on file in this action.

2 10. The Court further orders adjudges and decrees that the Plaintiffs'
3 mortgage lien under the Deed of Trust on the parcel of real property located in
4 Flathead County, Montana, and more particularly described as follows:

5 **PARCEL 3:**

6 THE SOUTH HALF OF GOVERNMENT LOT 3 OF SECTION 17,
7 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA.

8 **AND**

9 THE NORTH HALF OF GOVERNMENT LOT 4 OF SECTION 17,
10 TOWNSHIP 27 NORTH, RANGE 21 WEST, P.M.M., FLATHEAD
COUNTY, MONTANA. PARCEL K OF CERTIFICATE OF
SURVEY NO. 16282

11 (Hereinafter referred to as "Parcel 3").

12 is a second priority lien, subject only to the first lien of the Myers Revocable
13 Trust, but superior to any lien, right, title, claim or interest of any of the remaining
14 Defendants, their successors or assigns, or any other person or persons, save and
15 except for the right of redemption as allowed by law and real property taxes, and
16 the rights of the Defendant IRS as provided by Title 28 U.S.C. Section 2410© and
17 the Stipulations on file in this action.

18 **ORDER OF SALE**

19 11. It is further ordered that the Plaintiff's mortgage against the Mortgaged
20 Property above described, be ordered foreclosed pursuant to Montana law, and
21 that the Sheriff of Flathead County, Montana, or his authorized deputy or agent, is
22 hereby directed and ordered, as soon as reasonably possible, to properly notice and
23 conduct a Sheriff's sale of the Mortgaged Property at the Flathead County
24 Courthouse in Kalispell, Montana, in conformity with this Amended Final Judgment
25 But without further order. After the Sheriff or his deputy provides appropriate notice
26 as required by law, the Sheriff or his deputy is hereby directed to sell the Mortgaged

1 Property at public sale and said sale shall cause to foreclose all liens, claims and
2 rights of the Defendants, their successors and assigns and any and all other
3 persons who may have liens or rights against the Mortgaged Property, including
4 possession thereof, subsequent and/or inferior to the liens held by the Plaintiff,
5 except real property taxes and the rights of redemption, if any, including, but
6 subject to, the rights of the Defendant IRS as provided by Title 28 U.S.C. Section
7 2410(c) and the Stipulations on file in this action and, in the case of Parcel 3 only,
8 subject to the prior mortgage of the Myers Revocable Trust.

9 12. Unless the chronology under which parcels of Mortgaged Property are
10 sold is directed by the by the grantor under the Deed of Trust to the extent allowed
11 by law, the Mortgaged Property will be sold by the Sheriff or his deputy at a
12 "Sheriff's Sale" in the following chronological order: the lots in Parcel 5 and
13 related Common Area for said lots (and related fixtures and appurtenances),
14 beginning with Lot 4, will be sold first, and then Parcels 1,2,3 and 4 (and related
15 fixtures and appurtenances) will thereafter be sold in that order. The Parcels of
16 Mortgaged Property will be sold until the balance of this Amended Final Judgment is
17 fully satisfied or until all of the Mortgaged Property is sold. At the Sheriff's Sale,
18 Plaintiff may bid on the sale of each lot or parcel the amount of this Amended Final
19 Judgment (including allowed costs and attorney fees), or any portion thereof, as a
20 credit bid in lieu of cash, but any and all other bids must be in cash or cash
21 equivalent payable to the Sheriff in full and in cash at the conclusion of the
22 bidding. Proceeds from the sale shall be applied first to the Sheriff's fees and other
23 costs associated with noticing and conducting the Sheriff's Sale and then to the
24 indowment in favor of the Plaintiff herein, next to pay off junior liens, in the order
25 of their priority, including lien of the IRS, with any remaining surplus distributed
26 as directed by the Court. However, pursuant to the approved Stipulations with the

1 IRS, the IRS shall automatically receive any monies related to a homestead
2 exemption which might otherwise go to the owner/taxpayer under state law
3 regardless of priority position.

4 13. The successful purchaser of Mortgaged Property shall receive from the
5 Sheriff a Sheriff's Certificate of Sale, in conformity with §25-13-711, MCA, for
6 the Parcels purchased at the Sheriff's Sale by each purchaser.

7 14. The successful purchaser of Parcel(s) of Mortgaged Property at the
8 Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption
9 period beginning 10 days following the Sheriff's Sale.

10 15. Following expiration of the redemption period, said redemption period
11 which shall be one year from the date of the Sheriff's Sale pursuant to §25-13-802,
12 MCA, and presuming no redemption has been made, the Sheriff will deliver to the
13 purchaser(s), or to the purchaser(s)' assign, a Sheriff's Deed to the parcels
14 purchased and the recording of said Sheriff's Deed shall cause the termination of
15 all redemption rights in or to the Mortgaged Property or any portion thereof,
16 including any right of redemption or other right of the IRS.

17 16. For the purpose of calculating the price of redemption, interest will
18 accrue against the purchase price at the rate of 7.5% per annum.

19 17. In the event proceeds from the sale of the Mortgaged Property are
20 insufficient to satisfy this Amended Final judgment, Plaintiff may have a deficiency
21 judgment against William M. Russell to the extent allowed by law.


22 18. The Sheriff of Flathead County, Montana, or his authorized deputy or
23 agent, is hereby directed to immediately notice and sell the Mortgaged Property,
24 pursuant to the terms of this Amended Final Judgment after providing appropriate notice
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as required by law and under the terms and conditions described herein.

SO ORDERED this 9th day of March, 2018.


Hon. Robert B. Allison
District Court Judge

cc: William M. Russell
Martin S. King, Esq.
Victoria Francis, Esq.

ORIGINAL

FILED

02/05/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0238

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0238

KS VENTURES, LLC an Arizona Limited Liability
Company,

Plaintiff and Appellee,

v.

WILLIAM M. RUSSELL; K.E. SMITH REVOCABLE
TRUST; MYERS REVOCABLE TRUST; KIM
RUSSELL; SHARON HUFF; BEN WEILDING; THE
LAMAR COMPANIES; U.S. TREASURY by and
through the INTERNAL REVENUE SERVICE;
MONTANA SWEETGRASS RANCH
HOMEOWNERS' ASSOCIATION, INC.; DOE
DEFENDANTS I THROUGH X, inclusive,

Defendants,

WILLIAM M. RUSSELL,

Defendant and Appellant.

FILED

FEB 05 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

ORDER

On January 23, 2019, Appellant William Russell filed a Petition for Rehearing in the above-entitled matter. On January 29, counsel for Appellee KS Ventures objected to the petition.

This Court generally will grant rehearing on appeal only if our initial decision “overlooked some fact material to the decision,” overlooked a question presented that would have proven decisive to the case, or “conflicts with a statute or controlling decision not addressed” by the Court. M. R. App. P. 20(1)(a).

Upon review, we conclude that the Court did not overlook material facts that would have proven decisive to the case. However, we note a numerical misrepresentation in paragraph 5 of the Opinion. We have corrected the Opinion to reflect the amount KS Ventures loaned to Russell.

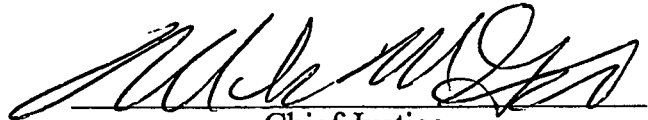
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Therefore,

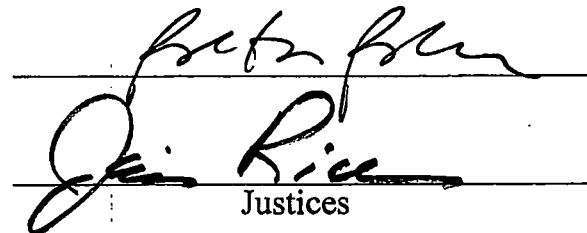
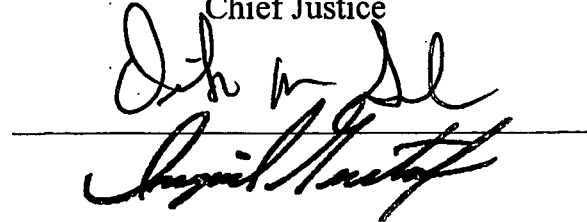
IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

The Clerk is directed to provide a copy of this Order to William M. Russell and to all counsel of record.

DATED this 5th day of May, 2018.



Chief Justice



Justices